Nos. 2, 3 and 4, Original.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

STATES OF WISCONSIN, MINNESOTA, OHIO AND PENNSYLVANIA,

Complainants,

vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,

Defendants.

STATE OF MICHIGAN,

Complainant,

vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,

Defendants.

STATE OF NEW YORK,

Complainant,

vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,

Defendants.

REPLY OF DEFENDANTS TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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STATES OF WISCONSIN, MINNESOTA, OHIO AND PENNSYLVANIA,

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STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,

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No. 2 Original.

STATE OF MICHIGAN,

Complainant,

vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,

Defendants.

No. 3 Original.

STATE OF NEW YORK,

Complainant,

vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,

Defendants.

No. 4 Original.

REPLY OF DEFENDANTS TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

The Solicitor General's Memorandum agrees with defendants' contention that the complainants' "Amended Application does not show facts which would justify modification of the 1930 decree at this time to require the

defendants to return the Sanitary District's sewage plant effluent to Lake Michigan" (p. 23). The Memorandum further states:

> "As we have indicated, the complainants have not shown any changes in circumstances since entry of the 1930 decree of sufficient magnitude to justify reopening and modifying the decree, under the rules applicable to such proceedings. That being so, no purpose could be served by appointing a Special Master to inquire into their allegations. And since it does not appear that the complainants are in any way injured by deficiencies, if any, in the operations of the Sanitary District, there appears to be an equal lack of reason for considering the appointment of a Permanent Master to supervise those operations." (pp. 29-30.)

> "For the reasons stated, we believe that the complainants have failed to sustain their burden of making sufficient allegations, and that the relief which they seek should be denied at this time." (p. 30.)

These conclusions are supported by the analysis contained on pages 13 to 23 of the Solicitor General's Memorandum. They are based not only on facts of record and judicially noticeable, but on material submitted to the Solicitor General by the parties and also by the Corps of Engineers and the Public Health Service (Solicitor General's Memorandum, p. 2).

After concluding that the complainants have not made out a case, and that no factual basis for modifying the 1930 decree has been established, the Solicitor General nevertheless suggests (p. 31) that a Special Master be appointed "to review the whole situation, not to change the present decree as applied to the present facts, but to recommend whether a supplemental decree be needed, and if so, what it should be, with respect to future changes as they may come."

It is to this suggestion that defendants now address themselves. Fully conscious of the thoroughness of the analysis of the Solicitor General and his concern for the best interests of all parties, defendants respectfully submit that the Solicitor General has not shown an adequate basis for his recommendation that such a reference be made.

1. The Solicitor General recognizes (p. 30) that no substantial change in circumstances has supervened since 1930, when the Court entered a decree "to compel the reduction of the diversion to a point where it rests on a legal basis * * *" (278 U. S. 367, 420). The decree was based on recommendations made "in accord with equitable principles * * * unfettered by technicalities * * * for the purpose of establishing substantial justice." (Master's 1929 Report, p. 139.)

The Solicitor General admits that the domestic pumpage now is about the same as in 1930 (p. 14), and that the inevitable increases "can hardly be considered a development that was unforeseen in 1930" (p. 18). Material submitted to the Solicitor General included a 1955 survey made for the City of Chicago by the engineering firm of Alvord, Burdick & Howson which indicates that by 1980 the domestic pumpage would be approximately 2200 c.f.s., as compared with 1700 c.f.s. in 1930. This is the same report as that summarized, in part inaccurately, by the complainants Michigan, Ohio and Pennsylvania in their Brief in Opposition in *Illinois* v. *Michigan, et al.*, No. 15 Original, this Term, page 19.* As was shown in defendants' brief in

*The "Engineers' Summary and Conclusions" are accurately copied in Appendix B to this Brief in Opposition in No. 15 Original. The table showing the estimated water consumption in 1980 which these States include in the text of that brief gives a total pumpage of 1489.1 MGD (million gallons per day), which is about 2300 c.f.s. This figure includes the entire suburban area to the Fox River, about thirty miles west of Chicago. But the next paragraph of the Report shows that the complainant States are in error in stating that by 1980 this *entire* area "would receive Lake Michigan water

opposition (pp. 7, 19), and as also appears from the Solicitor General's Memorandum (p. 11), data available in 1930 warranted a forecast of an increase in pumpage of about 75 c.f.s. per year. Thus, at that time it would have been thought that by 1940 the domestic pumpage would reach levels higher than those now estimated for 1980. Clearly, the Court did not expect that this fact would require modification of the decree or a comprehensive review of the case in 1940, just after the sewage treatment plants were to be completed.

The Solicitor General's Memorandum (pp. 16, 41-42) also shows that the Corps of Engineers estimates the annual loss to American shipping by 1985 to be only about $660,000, which is hardly significant.

The original decree is actually now operating much more favorably for complainants than could have been expected in 1930, for reasons set forth by the Solicitor General (pp. 10-11, 14-16) as well as by defendants in their brief in opposition, and will continue to do so for many years in the future. Since the passage of time has not impaired—but has on the contrary confirmed—the accuracy of the findings made after full inquiry in 1930, the appointment of a Special Master "to re-evaluate the demands and

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from the Chicago water department." This paragraph (Br. in Opp., No. 15 Original, p. 6b) states that many of these suburbs will continue to be independent of Lake Michigan water "for many years," and that "it is believed that these suburbs using Lake Michigan water by 1980 will require about 263 MGD or 19% *of the total requirement of 1379 MGD* for the average day"—not 373 MGD, as shown by complainants' table for the entire suburban area to the Fox River. (Emphasis supplied.) The estimated requirement for 1980 is thus 1379 MGD, or 2137 c.f.s., instead of 2300 c.f.s. To this amount should be added water consumed by a few riparian suburbs north of Chicago which do not obtain their water from Chicago and which are therefore not covered by the Report. At present these communities use about 45 c.f.s., which is included in the total domestic pumpage shown on page 6 of Defendants' Brief in Opposition in the case at bar.

potentialities of the situation" (p. 37), attempt to chart the future, and make plans for unforeseeable contingencies that may occur, appears to be altogether premature and unjustified. This Court is not acting completely at large. It has issued a decree, and that decree must stand unless "something has happened which will justify us *now* in changing it." *U. S.* v. *Swift & Company,* 286 U. S. 106, at 119. (Emphasis supplied.)

Defendants are not suggesting, of course, that the Court can look only to the present. A court of equity can consider the needs of the proximate future, but a court which is limited to the consideration of cases and controversies cannot be concerned with a period so distant that any prognostication as to what may then be needed would necessarily be almost completely conjectural, and perhaps obsolete by that time. *Arizona* v. *California,* 283 U. S. 423, 460-464. Indeed, three of the complainants, in their Brief in Opposition to the Motion for Leave to File Complaint in *Illinois* v. *Michigan, et al.,* No. 15 Original, this Term, have stated (p. 14) that "any potential threat of damage or injury, representing only a possibility for the indefinite future, is no basis for a decree * * *."*

2. Furthermore, defendants do not believe the Court should assume the burden of initiating and conducting the suggested inquiry. It is difficult to determine what judicial function would be served by such a study. The Solicitor General suggests (pp. 36-37) that because there is a justiciable controversy before the Court, in which the Court retains continuing jurisdiction, the Court has equity power to exercise reasonable foresight in planning for the future. Traditionally, the Court has acted in cases or

* Although it is difficult to see how this principle can possibly apply to *Illinois* v. *Michigan, et al.,* No. 15 Original, the established practice of not considering the indefinite future would seem to apply to the suggestion of the Solicitor General in the instant case.

controversies on, or with respect to, adversary pleadings and issues—not for advisory purposes or as an independent investigating authority.

United States v. *California*, 334 U. S. 855, is cited by the Solicitor General (p. 38) as a precedent for the appointment of a Special Master to make an independent investigation. In that case the Court reserved jurisdiction to "determine with greater definiteness particular segments of boundary" between California and the marginal sea over which the United States had been declared to have paramount rights and power. A petition was filed by the Government praying that the precise boundary of certain segments of the California coastal area be ascertained. California then urged that there was a need for a prompt determination of the precise California boundary all the way from Oregon to Mexico. The Court expressed doubt concerning the particular segments of the boundary to be determined and (p. 856) appointed a Master "to make inquiry into the subject and hold hearings, if he finds it necessary, in order to make recommendations * * * as to what particular portions of the boundary call for precise determination and adjudication." Thus, the Government, as one of the parties, petitioned for the determination of a specific matter previously left open and which involved the demarcation of a part of a boundary. The Master's function was merely to recommend what parts of the boundary should be precisely determined and adjudicated. The Master was thus confined to making a particular recommendation to the Court. We submit this to be no precedent for a commission to supervise studies, correlate results, and report a course to be followed in planning to meet necessary requirements in the future, as recommended by the Solicitor General in the case at bar (pp. 35, 38).

3. It is not to be thought that inertia (p. 31) or inaction is the only alternative to the suggested study. The parties, complainants and defendants, are at full liberty to make their own studies and to present their recommendations to the Court and apply for appropriate relief at any time that circumstances warrant, under paragraph 7 of the decree. Informed action based upon evidence of changed circumstances, actual or impending, with due regard for matters already adjudicated, should adequately protect the interests of all.* This is the way the judicial process normally operates, and there is no reason to believe that established procedures cannot work satisfactorily here. Paragraph 7 of the decree of 1930 constitutes an adequate safeguard and provides ample opportunity for timely presentation to the Court of matters not heretofore considered. It is manifest that the Court in 1930 concluded that ordinary judicial processes would be sufficient for the administration of the decree in the future.

In addition, existing agencies under the direction of the executive branch of the government have made studies from time to time and may expand such studies relating to the diversion at Chicago and matters pertaining to the Great Lakes. The report of the Corps of Engineers, U. S. Army, made in January, 1957, entitled "Effects on Great Lakes and St. Lawrence River of an Increase of 1000 Cubic Feet per second in the Diversion at Chicago," contained in Senate Document 28, 85th Congress, First Session, 1957 (see Brief in Opposition, p. 7), was such a study. This study (p. 2) refers to "a comprehensive report now being prepared by the Corps of Engineers concerning the overall problem of controlling the levels of the Great Lakes." These agencies are empowered to make any similar or other studies that the exigencies of conditions now or here-

* Defendants will make available their pertinent records and facilities and cooperate in obtaining any other relevant factual information.

after may demand. They are not only empowered to make such studies, but they are eminently equipped to make them. Any new facts developed by such studies having a bearing on subject matters in controversy and warranting a reopening of the decree may be presented to the Court by complainants or defendants.

4. Finally, a long-range planning program would seem to fall more appropriately within the functions of Congress. Whether the problems presented are to be viewed from the standpoint of federal interests involved and the welfare of the people of the United States as a whole (see Solicitor General's Memorandum, p. 3), or from the standpoint of the parties to this lawsuit, Congress, which represents all the states and has plenary power over navigable waters, has power to conduct studies relating to the needs of the Illinois Waterway and the Great Lakes, to determine the amount of water to be withdrawn from Lake Michigan, and to impose conditions upon which the withdrawal of water may be permitted. This power was recognized by this Court in the earlier stages of this litigation. See 278 U. S. 367, 417; 281 U. S. 179, 198, 200; *Sanitary District* v. *United States,* 266 U. S. 405, 426.

5. Last Term this Court held inadequate complainants' original application, with leave to renew the application and motion with allegations made more definite and certain as a basis for the relief sought. Despite the Solicitor General's recognition of the complainants' failure to sustain their burden of making sufficient allegations, and his admission (p. 30) that "no substantial change in circumstances has supervened," he suggests that the whole matter be restudied, on the supposition that an independent investigation could provide "specific findings and proposals to which the parties could address themselves" (p. 38).

Defendants submit that this is too amorphous and indefinite a basis for the appointment of a Special Master and

all that that entails. The Solicitor General's suggestion is more indefinite than the original application of complainants which the Court found to be insufficient last Term.

Defendants submit, therefore, that no reason has been shown for the appointment of a Special Master.

Respectfully submitted,

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